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No. _____

In the Supreme Court of the United States

October Term, 1995

RICHARD AND GWEN WACEK,

Petitioners,

vs.

SALLY J. VAVRICKA-AAKRE AND,
RAMONA BREITKREUTZ,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA

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QUESTIONS PRESENTED

Minnesota law permits a former owner of farmland a right of first refusal to meet the price offered by a third-party purchaser; this right of first refusal may be exercised by a person following bankruptcy even though the person's rights to the property may have otherwise been extinguished.

The questions presented are:

I: Whether a sale free and clear of all liens can divest a bankrupt debtor of the right of first refusal granted under Minnesota Statutes, 500.24, Subd. 6, if the right of first refusal is not property of the estate?

II. Whether an order for a sale free and clear of all liens acts as res judicata or collaterally estops a debtor who had not received an offer of the right of first refusal at the date of the filing of the bankruptcy petition and who later litigates to get this right of first refusal?

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No.

In The
SUPREME COURT OF THE UNITED STATES

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RICHARD AND GWEN WACEK,
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v.

SALLY J. VAVRICKA-AAKRE and
RAMONA BREITKREUTZ
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF THE UNITED STATES

Richard and Gwen Wacek respectfully petition for a Writ of Certiorari to the Supreme Court of the State of Minnesota and the Minnesota Court of Appeals.

OPINIONS BELOW

Petitioners-Wacek seek review of an unpublished decision of the Minnesota Court of Appeals, filed September 12, 1995; the petition for rehearing was denied by order of the Minnesota Supreme Court filed November 4, 1995.

STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked under 28

U.S.C., Section 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

Article VI [2] of the Constitution of the United States provides that the "Laws of the United States...shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby...." Also, Article 1, Section 8, requires "uniform Laws on the subject of bankruptcies."

STATEMENT OF THE CASE

Richard and Gwen Wacek farmed land in rural Renville County, Minnesota. During the farm crisis, Waceks sought protection from their creditors in United States Bankruptcy Court. Without challenge by the Waceks, the standing bankruptcy Trustee obtained judicial permission to sell the Waceks' property free and clear of all liens including "all rights of the debtor which are now vested in the bankruptcy estate to * * * the rights of first refusal [to repurchase their land].

At the time of their purchase of Waceks' former land, the buyers were concerned that Waceks might claim the right of first refusal. Waceks eventually filed suit against the defendant-buyers, initiating this case; these buyers impleaded Farm Credit Bank, the seller, but this defendant negotiated a release and was dismissed as a party.

The issues related to the questions of property of the estate and the effect of a sale free and clear of liens under the United States Bankruptcy Code were first raised at the trial court in response to defendants' motion for summary judgment. These issues were considered by the Minnesota Court of Appeals in its opinion, 4a-5a.

COURSE OF PROCEEDINGS

The State trial court granted defendants' motion for summary judgment on a theory of collateral estoppel or res judicata. The Minnesota Court of Appeals affirmed the lower court's decision, reasoning that the these legal doctrines precluded Wacek's lawsuit. The Minnesota Supreme Court declined review.

REASONS FOR GRANTING THE WRIT

The decision of the Minnesota Court of Appeals stands in direct conflict with the only published decision of the United States Bankruptcy Court, In re Solberg, 125 B.R. 1010 (D. Minn. 1991), a decision which holds that the right of first refusal under Minnesota Statutes, Section 500.24, is not part of a bankrupt's estate and does not even come into being until the former owner's property is offered for sale to a third-party buyer.

Minnesota Statutes, Section 500.24, subd. 6, relates that

> [No federally-chartered corporation may] sell agricultural land or a farm homestead before offering or making a good faith effort to offer the land for sale or lease to the immediately preceding former owner at a price no higher than the highest price by a third party that is acceptable to the seller or lessor.

The 1987 revision of the right of first refusal legislation granted the right of first refusal to bankrupt debtors, here the Waceks. The statute had previously excluded a bankrupt individual or a bankruptcy estate from

receiving a right of first refusal.

Only an impending sale to a third party prompts the right of first refusal, Buer v. Atwater State Bank, 477 N.W.2d 782 (Minn. Ct. App. 1991).

The bankruptcy court could not divest the Waceks of their statutory right of first refusal under Minnesota Statutes, Section 500.24, by means of a sale free and clear of liens: The Bankruptcy Court Order offered only "rights of the debtor which are now vested in the bankruptcy estate * * * to the rights of first refusal regarding * * * purchase of this property...," Order Authorizing sale of Property Free and Clear of Liens and Encumbrances, In re Wacek, Bankruptcy Case No. 3-85-1153. The bankruptcy estate never, at any time, possessed anything in the nature of a vested right of first refusal to sell or convey to Federal Land Bank.

In re Solberg, op. cit., 1020-21, explicitly considered the issue of whether the bankruptcy estate acquires the right of first refusal:

> MINN. STAT. [Section] 500.24, subd. 6[, the right of first refusal legislation] does not purport to create, attach, or affect any interest in the foreclosed land itself; rather, it regulates the seller's post-foreclosure sale or lease of the land or any other disposition of its contractual or property rights for consideration which a foreclosing creditor may make during the enforcement of those rights. In the ordinary case, the event which triggers the Minnesota right would occur later in the seller's enforcement. The farmer-borrower's options are narrower; **the farmer borrower has no rights to demand or to exercise until the seller has receive**

> **a third-party offer which is acceptable to the seller**, and the farmer-borrower has nothing more than the senior right to purchase the property for the same price, regardless of its current appraised price.
>
> * * *
>
> [The right of first refusal] did not become part of the Debtor's bankruptcy estate. (Emphasis added.)

11 U.S.C., Bankruptcy Code, Section 541(a)(1), states that the bankruptcy estate consists of "all legal or equitable interests of the debtor in property as of the commencement of the case." The trustee has the right to "assign and sell [these the] same as any other asset of the estate." Collier on Bankruptcy, 541.07 (King, ed., 15th ed. 1992). However, as of the date of the commencement of the Waceks' Chapter 7 case, no right of first refusal belonging to the Waceks existed in any form.

Whetzal v. Alderson, 32 F.3d 1302 (8th Cir. 1994), shows that Section 541(c)(2)(d), Bankruptcy Code, excludes from property of the estate, property in which the debtor holds a mere equitable interest rather than a legal interest.

In bankruptcy Court, collateral estoppel requires four elements,

> (1) The issue sought to be precluded must be the same as that involved in the prior action;
> (2) The issue must have been actually litigated;
> (3) The issue must have been determined by a valid and final judgment;
> (4) The determination of the issue must have been essential to the final judgment.

Schwartz v. Renville Farmers Co-op Credit Union, 44 B.R.

266, 268 (D. Minn. 1984), citing In re Supple, 14 B.R. 898, 903 (Bankr. Conn. 1981).

If the right of first refusal did not exist at the time the bankruptcy court heard the motion to sell free and clear and it is clear that it did not, there could have been no issue identity. Also, any sale of the right of first refusal was not essential in any way to the primary purpose of selling the equity in property to a mortgage lien holder.

The Minnesota legislature intended that the Right of First Refusal "survive" a bankruptcy proceeding to come into being for the benefit of farm families who had been through bankruptcy: The foreclosing-party-and-now-seller-of-the-land must offer a right of first refusal to the former farmer-owner before a sale to a third-party buyer can actually be consummated.

Minnesota case law has also held that a bankruptcy court's decision is "not entitled to collateral estoppel effect," where a bankruptcy court's determination was not necessary to the overall decision. State Bank in Eden Valley v. Euerle Farms, Inc., 441 N.W.2d 121, 126 (Minn. Ct. App. 1989), citing Mickelson v. Roseberg, 291 Minn. 176, 182, 190 N.W.2d 82, 86 (1971). In the Wacek matter, the purpose of the motion brought by the Bankruptcy Trustee was to allow a sale free and clear of all liens which attached to the real property being sold. See County Fuel Co. v. Equitable Bank Corp., 832 F.2d 290, 293 (4th Cir. 1987), where the Court determined that neither a debtor's failure to object to a creditor's claim or to raise a counterclaim in opposition to a creditor's motion to lift the automatic stay would warrant invoking the doctrine of res judicata. See also Roseberg v. Steen, 363 N.W.2d 102 (Minn. Ct. App. 1985).

Res judicata does not apply to the facts of the Wacek case either: In re Miller, 153 B.R. 269, fn. 7 (D. Minn. 1993), citing Lane v. Peterson, 899 F.2d 737 (8th Cir. 1990), suggests that "[c]laims need not have been actually litigated in a subsequent action, they need only to have been available to the plaintiff in the original action." Waceks had no claim to join which could have related to any right of first refusal at the time of the sale free and clear of liens by the Trustee.

This United States Supreme Court in Brown v. Felsen, 422 U.S. 127 (1979), held that parties ought not be forced to try matters when these were not directly at issue and where neither party had a full incentive to litigate the matter. This militates against the application of res judicata or collateral estoppel in the present case.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Dated at St. Paul, Minnesota, this 31st day of January, 1996.

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APPENDIX-A

STATE OF MINNESOTA

IN THE SUPREME COURT

C8-95-459

Richard and Gwen Wacek,

Appellants,

vs.

Sally J. Vavricka, f/k/a Sally J. Aakre, et al.,

Respondents.

ORDER

Based upon all the files, records and proceedings herein,

IT IS HEREBY ORDERED that the petition of Richard and Gwen Wacek for further review be, and the same is, denied.

Dated November 3, 1995.

BY THE COURT

APPENDIX-B

NOTICE: THIS OPINION IS DESIGNATED AS UNPUBLISHED AND MAY NOT BE CITED EXCEPT AS PROVIDED BY MINN. ST. SEC. 480A.08(3).

Richard Wacek, et al., Appellants,

v.

Sally J. Vavricka, f/k/a Sally J. Aakre, et al., Respondents.

No. C8-95-459.
Court of Appeals of Minnesota.
Sept. 12, 1995.

Lawrence H. Crosby, St. Paul, MN
Jeff C. Braegelmann, Dustan J. Cross, New Ulm, MN

Considered and decided by PETERSON, Presiding Judge, LANSING and SCHUMACHER, JJ.

UNPUBLISHED OPINION

LANSING, Judge.

The district court entered summary judgment against former land owners' equitable action asserting statutory rights of first refusal extinguished in a prior bankruptcy proceeding. We affirm the court's holding that the former land owners are precluded from collaterally attacking the validity of the order six years after its entry when they had notice of the order and did not respond, directly attack the order, or appeal.

FACTS

This is an alternative action for ejectment or to quiet title brought by former owners of two parcels of agricultural land, Richard and Gwen Wacek, against the current owners of the property, Ramona Breitkreutz and Sally Vavricka. Breitkreutz purchased one parcel in 1989 and Vavricka purchased the other parcel in 1990 from Agribank, formerly The Federal Land Bank of St. Paul. Agribank had previously held the Waceks' mortgage, which was in excess of the property's fair market value, and in 1988 Agribank purchased both parcels from the Waceks' bankruptcy trustee.

The Waceks' chapter eleven bankruptcy was filed in 1985. As part of the bankruptcy proceeding, the trustee moved to sell the parcels to Agribank free and clear of all encumbrances, including the Waceks' statutory right of first refusal. The Waceks received notice of the motion and the pending hearing, but did not respond to the motion or attend the hearing.

The bankruptcy court granted the motion and ordered that the land be sold to Agribank free and clear of all existing liens and encumbrances, specifically including "the rights of first refusal regarding the rental and purchase of this property and any other rights the debtors may assert." The Waceks did not appeal the bankruptcy court's order.

The Waceks brought this action against Breitkreutz and Vavricka in 1994, asserting that Agribank's failure to extend them the right of first refusal prior to the sale violated Minn.Stat. Sec. 500.24, subd. 6 (1990 & Supp.1991). Breitkreutz and Vavricka impleaded Agribank as a third party defendant but, after negotiations with the

bank, stipulated to a dismissal. The Waceks subsequently moved to add Agribank as a defendant, but the district court denied the motion finding they were time barred by the statute of limitations.

Breitkreutz and Vavricka moved for summary judgment on the grounds that the bankruptcy court's order collaterally estopped the Waceks from bringing this action or alternatively that they are not liable for damages under Minn.Stat. Sec. 500.24, subd. 6 because the statute applies to sellers and not buyers. The district court concluded that the Waceks were collaterally estopped from asserting their first-refusal claims and entered summary judgment against them. The summary judgment order did not address whether Minn.Stat. Sec. 500.24 imposes liability only on sellers.

DECISION

Under the doctrine of res judicata, "issues litigated or which could have been litigated in a former action cannot be relitigated in a subsequent action." Mattson v. Underwriters at Lloyds of London, 414 N.W.2d 717, 719 (Minn.1987). Res judicata prevents parties from splitting claims into more than one lawsuit and precludes further litigation of the same claim. Loo v. Loo, 520 N.W.2d 740, 744 n. 1 (Minn.1994). Collateral estoppel prevents a party from relitigating issues actually litigated and necessarily determined in a prior lawsuit. Id. Both doctrines have a preclusive effect and are supported by the general policy favoring the finality of judgments. Mattson, 414 N.W.2d at 720. An order as well as a judgment must be given preclusive effect when the order is final and subject to appeal. Nelson v. Auman, 221 Minn. 46, 48-49, 20 N.W.2d 702, 704 (1945).

Relying on In re Solberg, the Waceks argue that the district court erred in giving preclusive effect to the bankruptcy court's order approving the sale of the Waceks' two parcels free and clear from their right of first refusal. 125 B.R. 1010 (Bankr.D.Minn.1991). In Solberg the bankruptcy court held that a debtor's right of first refusal did not come into existence until the property was offered to a third party and thus the right was not part of the bankruptcy estate. Id. at 1021.

There are, however, significant differences between the facts and procedures in Solberg and the facts and procedures in this action. First, the debtor's refusal rights in Solberg are raised in a direct federal court declaratory judgment action and these rights have not been determined in a previous action. Id. at 1012; see Town of Burnsville v. City of Bloomington, 264 Minn. 133, 143, 117 N.W.2d 746, 753 (1962) (declaratory judgment is a direct action rather than a collateral attack). This is significantly different from the Waceks' claim which is a state court action for ejectment or to quiet title that collaterally attacks the bankruptcy court's order that extinguished the Waceks' first-refusal right six years ago.

Second, the order relating to the Waceks' land provided that it was sold "free and clear of all * * * encumbrances." The order specifically referenced "the [Waceks'] rights of first refusal" and "any other rights the debtors may assert." The Solberg land buyers, however, purchased the land "subject to" the debtors' statutory right of first refusal. 125 B.R. at 1012.

Third, the Waceks received notice of the bankruptcy court order extinguishing their right of first refusal, but they did not respond to the motion or attend the hearing.

The Solberg debtors "never made any statement or [took] any action" suggesting a waiver of their rights of first refusal. Id.

The Waceks' additional arguments against the preclusive effect of the bankruptcy order appear to relate to the bankruptcy court's jurisdiction over the property or the first-refusal rights. See Lange v. Johnson, 295 Minn. 320, 324, 204 N.W.2d 205, 208 (1973) (order issued by a court lacking subject matter or personal jurisdiction is void). But the Waceks' argument that the trustee should not have conveyed the first-refusal rights does not equate to a lack of jurisdiction. See Sheridan v. Sheridan, 213 Minn. 24, 29, 4 N.W.2d 785, 788 (1942) (order only void if court lacks underlying jurisdiction, not because of legal error). The bankruptcy court indisputably had personal jurisdiction over the Waceks, and the Waceks concede that they had notice of the sale and its terms. The bankruptcy court also indisputably had jurisdiction over the Waceks' property. See 11 U.S.C. Sec. 541(a)(1) (1994) (bankruptcy estate includes all legal or equitable interests of the debtor in property as of the commencement of the case). Whether the trustee could sell the attendant first-refusal rights goes to the merits of the case, not the subject matter jurisdiction.

The Waceks had an opportunity to respond on the merits or to challenge the bankruptcy court's order, but they did not. Six years later they cannot reopen the bankruptcy court proceedings through a quiet title action against later purchasers of the land. See County of Blue Earth v. Stauffenberg, 264 N.W.2d 647, 649 (Minn.1978) (refusing to award relief by indirect procedure when it was otherwise unavailable). A bankruptcy court order confirming a sale by the trustee is not subject to collateral attack. BAACT Corp. v. Executive Aero, Inc., 312 Minn. 143, 147, 251

N.W.2d 107, 109 (1977).

Because we affirm the summary judgment, the Waceks' motion to add Agribank as a party is moot. For similar reasons we decline to address Breitkreutz and Vavricka's argument that Minn.Stat. Sec. 500.24, subd. 6 does not apply to them as buyers. That issue was not considered by the district court, and we will not consider issues not passed on below. See Thiele v. Stich, 425 N.W.2d 580, 582 (Minn.1988).

Affirmed.

APPENDIX-C

STATE OF MINNESOTA IN DISTRICT COURT

COUNTY OF RENVILLE EIGHTH JUDICIAL DISTRICT
Civil Division

Richard Wacek and Gwen Wacek, husband and wife,

Plaintiffs,

File No.: C5-94-124

ORDER ON MOTION FOR SUMMARY JUDGMENT

Sally J. Vavricka, f/k/a Sally J. Aakre, and Ramona Breitzkreutz,

Defendants.

- -

The above-entitled matter came before the Court on October 3, in Olivia, Minnesota for consideration of the Defendants' or summary judgment.

The Plaintiffs were represented by Lawrence H. Crosby, at Law. The Defendants were represented by Jeff C. Braegelmann, Attorney at Law.

Based upon the record, the Court hereby makes the following:

FINDINGS OF FACT

I.

On May 21, 1985, the plaintiffs filed a joint Chapter 11 in Bankruptcy Court. At the time of filing the Waceks

owned subject to a mortgage in favor of Federal Land Bank of Saint Paul, a/k/a AgriBank, FCB, the following two parcels:

> The Northwest Quarter of the Northeast Quarter, Section 19, Township 114 North, Range 35 West, Renville County, Minnesota, and West Half, Section 8, Township 113 North, Range 35 West, Renville County, Minnesota, except 3.5 acres as set out in the legal description.

II.

The plaintiffs claim that they hold a statutory right of first refusal on the two parcels of property pursuant to Minn. Stat. Section 500.24, subd. 6, and that the statutory right of first refusal constitutes an equitable interest in the two parcels. Since the right of first refusal was never offered to them, the plaintiffs seek to assert the right by way of an action to quiet title or ejectment.

III.

The plaintiffs admit they received the bankruptcy trustee's Notice of Motion and Motion for Reduction of Time and for Sale Free and Clear dated April 12, 1988. The Notice of Motion stated, in relevant part:

> [Y]our Trustee proposes to sell the above described real estate free and clear of all liens and encumbrances including rights of first refusal for lease or purchase as they may exist under state or federal law to [AgriBank].

IV.

The Bankruptcy Court, in an Order dated May 2, 1988, found that "proper notice of sale and notice of this hearing and motion have been given to all parties in interest pursuant to applicable bankruptcy rules, including Local Bankruptcy Rules 107 and 110." The Bankruptcy Court granted the trustee's motion in all respects and specifically ordered that:

> said sale shall be free and clear of all existing liens and encumbrances, and shall encompass and convey to The Federal Land Bank of St. Paul all rights of the debtor which are now vested in the bankruptcy estate to mediation, the rights of first refusal regarding the rental and purchase of this property and any other rights the debtor may assert to this property excepting only the mortgage of the Federal Land Bank of St. Paul and unpaid real estate taxes and assessments.

V.

The Waceks did not appeal from the Bankruptcy Court's order.

CONCLUSIONS OF LAW

1. The plaintiffs are collaterally estopped from claiming a right of first refusal pursuant to Minn. Stat. §500.24, subd. 6 due to the Bankruptcy Court's order dated May 2, 1988.

ORDER

1. The defendants' motion for summary judgment is hereby granted.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated this 29th day of November, 1994.

Randall Slieter
Judge of District Court

MEMORANDUM

Summary judgment is appropriate if there is no genuine issue as to any material fact. Rule 56.03, Minn.R.Civ.P. The court, on a motion for summary judgment, may not resolve a factual issue, but must only determine whether or not a fact issue exists. Writers, Inc. v. West Bend Mutual Ins. Co., 465 N.W.2d 419 (Minn.Ct.App. 1991). The function of the trial judge on a motion for summary judgment is not to weigh the evidence. Murphy v. Country House Inc., 307 Minn. 344, 240 N.W.2d 507 (1976). Neither the trial court's opinion nor the reviewing court's opinion as to the chance of the plaintiff prevailing at trial is a proper criterion in deciding whether to grant summary judgment. Dempsey v. Jaroscak, 290 Minn. 405, 188 N.W.2d 779 (1971). Even if the record leads one to suspect that it is unlikely that a party will prevail at trial, that fact is not a sufficient basis on which to refuse that party a day in court concerning issues not shown to be a sham, frivolous, or so insubstantial that trying them would be an exercise in futility. Larson v. Independent School District No. 314, 312 Minn. 583, 252 N.W.2d 128 (1977). "Summary judgment is a blunt instrument and should be employed only where it is perfectly clear that no genuine issue of material fact is involved." Nord v. Herreid, 305 N.W.2d 337, 339 (Minn.1981). The non-moving party has

the benefit of the view of the evidence which is most favorable and is entitled to have all doubts and factual inferences resolved against the moving party. If the non-movant fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial, then summary judgment is appropriate. Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

The issue in the case at bar is whether the plaintiffs are collaterally estopped, by the Bankruptcy Court's Order dated May 2, 1988, from claiming they continue to hold a statutory right of first refusal. Collateral estoppel applies where 1) the issue to be decided was identical to one in a prior adjudication; 2) there was a final judgment on the merits; 3) the estopped party was a party or a party in privity with a party to the prior adjudication; and 4) the estopped party was given a full and fair opportunity to be heard on the adjudicated issue. Costello v. Aetna Cas. & Sur. Co., 472 N.W.2d 324, 326 (Minn. 1991). In addition, a default judgment collaterally estops the issues pled in the complaint. Roberts v. Flanagan, 410 N.W.2d 884 (Minn.Ct.App. 1987).

In the case at bar, the issue is whether the plaintiffs continue to hold a statutory right of first refusal. This issue is identical to one decided by the Bankruptcy Court in the May 2, 1988 decision. The Bankruptcy Court Order was a final judgment on the merits since it ended the Bankruptcy Court's involvement with the Waceks' real property. See In re Charter Co., 778 F.2d 617, 621 (llth Cir. 1985). Finally, the Waceks were a party to the bankruptcy action and they were given a full and fair opportunity to be heard on the matter.

The fact that the right of first refusal may not have come into existence as of the date of the Bankruptcy order pursuant to In re Solberg, 125 B.R. 1010 (Bankr. D. Minn. 1991) is not determinative in this case. The Bankruptcy Court has jurisdiction over matters "related to" Chapter 11 cases where the outcome could conceivably have any effect on the estate being administered in bankruptcy. In re Kreidle, 143 B.R. 941, 943 (Bankr. D. Colo. 1992). "An action is related to bankruptcy if the outcome could alter the debtor's rights, liabilities, options, or freedom of action ... and which in any way impacts upon the handling and administration of the bankrupt estate." Pacor, Inc. v. Higgins, 743 F. 2d 984, 994 (3rd Cir. 1984), cited also in National City Bank v. Coopers and Lybrand, 802 F.2d 990, 994 (8th Cir. 1986). The extinguishment of the right of first refusal was related to the bankruptcy in that it effects the Waceks' rights and options relating to the real estate in question. Furthermore, unlike the debtors in Solberg, the Waceks were notified that the right of first was refusal was sought to be extinguished and they were given an opportunity to litigate that issue in the Bankruptcy Court. They now wish to relitigate the exact same issue.

For these reasons, the defendants motion for summary judgment is hereby granted.

R.J.S.